

## **Environmental Audit Immunity Laws: A State-by-State Comparison\***

### **Introduction:**

In the past several years a number of states have passed legislation providing for a qualified privilege for environmental audit reports and the documents associated with the preparation of the reports.<sup>1</sup> As of September 1997, 20 states have also passed legislation that

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<sup>1</sup> As of April, 1997, Alaska (Ak. Statutes Sec. 09.25.450 to .465), Arkansas (Ark. Code Ann. 8-1-301 - 8-1-312(1995)), Colorado (Colo. Rev. Stat. 13-25-126.5 (1995)), Idaho (1995 Idaho Sess. Laws 359), Illinois (Ill. Rev. Stat. Ch. 415, para 5/52.2 (1995)), Indiana (Ind. Code Ann. 13-10-3-1 - 13-10-3-12 (1995)), Kansas (1995 Kansas Sess. Laws 204), Kentucky (Ky. Rev. Stat. Ann. 224.01-040 (1995)), Michigan (Mich. Comp. Laws 324.101 - 90106 Part 148 (1996)), Minnesota (1995 Minn. Laws 168), Mississippi (Miss. Code Ann. 49-2-71 (1995)), Nevada (Title 40, Nev. Revised Statutes, Sec. 1, 11-12), New Hampshire (1996 N.H. Laws 4), Ohio (Ohio Rev. Code 3745.70 - .73 (1996)), Oregon (Or. Rev. Stat. 468.963 (1995)), South Carolina (1996 S.C. Code Sec. 2, Ch. 57, Title 48), South Dakota (1996 S.D. S.B. 24), Texas (1995 Tex. Gen. Laws 219), Utah (Utah Code Ann. 19-7-103 - 19-7-107 (1995)), Virginia (Va. Code Ann. 10.1-1198 (1995)), and Wyoming (Wyo. Stat. 35-11-1105 - 1106 (1995)) have passed environmental audit privilege laws.

Some states have even extended the privilege to include a testimonial privilege for the owner or operator of the facility who performs or has the audit performed, and the employees and anyone else associated with the audit. For example, Kansas, Michigan, South Carolina, Texas, and Virginia provide that persons associated with the audit can not be compelled to testify, Colorado provides that an employee may not be examined without the consent of the holder of the privilege or unless ordered to do so by a court, while Ohio forbids an employee to testify about an audit without the permission of the owner or operator of the facility. Illinois' law prohibits examination, as to the environmental audit or audit report, of the following persons: the owner or operator who performs or directs the audit, an officer or employee involved with the audit, or any consultant hired for the purpose of performing the audit.

provides for penalty immunity for violations discovered through an environmental audit, while another 19 states have proposed such legislation.<sup>2</sup> While many articles have been written concerning the privilege side of the environmental audit legislation,<sup>3</sup> in comparison few have addressed the provisions in state legislation that provide for penalty immunity.<sup>4</sup> This paper focuses on environmental audit immunity legislation, and provides a lengthy synopsis of the provisions of such legislation enacted as of September 1997. It does not address either the desirability of having such legislation or the problems associated with these laws.<sup>5</sup> Instead, it attempts to summarize and categorize the provisions contained in each law, and by placing the analysis in table format, allows a comparison of the provisions contained in the different states' laws. This format should provide a handy reference for the practitioner grappling with these laws and the nuances contained within them.

Because of the oversight role the United States Environmental Protection Agency (EPA) plays in the approval and monitoring of federally delegated state environmental programs,<sup>6</sup> and because many of the states' laws provide for immunity for violations of laws within those federally

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<sup>2</sup> See accompanying chart for the relevant states and the statutory cites to the legislation. Alabama, California, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Massachusetts, Maine, Missouri, North Carolina, Nebraska, New York, Oklahoma, Pennsylvania, Tennessee, West Virginia and Wisconsin have introduced audit immunity laws as of September 1997.

<sup>3</sup> A recent search on Westlaw produced 75 related articles. See for example, Goldsmith and King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 Vand. L. Rev. 1 (1997), and Sorenson, *Comment: The U.S. Environmental Protection Agency's Recent Environmental Auditing Policy and Potential Conflict with State-Created Environmental Audit Privilege Laws*, 9 Tul. Env'tl. L. J. 483, (1996).

<sup>4</sup> As a recent example see Spicer, *Turning Environmental Litigation on its E.A.R.: The Effects of Recent State Initiatives Encouraging Environmental Audits*, 8 Vill. Env'tl. L.J. 1 (1997).

<sup>5</sup> See, for example Johnston, *An Essay on Environmental Audit Privileges: The Right Problem, the Wrong Solution*, 25 Env'tl. L. 335 (1995), for a discussion of problems with immunity legislation. See also, Cushman, *Laws to Guard Environment are Skirted, Groups Assert*, The New York Times, Thursday January 30, 1997, p. A10.

<sup>6</sup> For example, the Clean Water Act (33 U.S.C.A. Sec. 1251 - 1387), and the Clean Air Act ( 42 U.S.C.A. Sec. 7401-7671q).

delegated state programs, the tables are organized along EPA regional boundaries.<sup>7</sup>

The tables are divided into three main sections: (A) General Statutory Provisions, (B) Immunity: General Applicability, and (C) Exceptions to Immunity. Also included is a small section on states' issues. In the section entitled "General Statutory Provisions", the statutory citations and effective dates are given, along with a subsection on the meaning of the term "voluntary" as associated with an environmental audit. Most states require a violation to be voluntarily disclosed before any penalty immunity will be applicable.<sup>8</sup> Only nine of the 16 states specify who has the burden of proving that the disclosure is voluntary,<sup>9</sup> and 11 of the 16 specify the elements of a prima facie case for "voluntariness".<sup>10</sup> Only three states, New Jersey, Rhode Island and South Carolina, do not require the identification of the violation to have come from an environmental audit.

The section entitled "Immunity: General Applicability" discusses to whom the penalty immunity applies and the extent of the immunity given. Most states provide immunity from administrative and civil penalties,<sup>11</sup> while eight states provide some immunity or mitigation for

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<sup>7</sup> The EPA regional state breakdown is as follows: Region I - Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont. Region II - New Jersey, New York, Puerto Rico, Virgin Islands. Region III - Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia. Region IV - Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee. Region V - Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin. Region VI - Arkansas, Louisiana, New Mexico, Oklahoma, Texas. Region VII - Iowa, Kansas, Missouri, Nebraska. Region VIII - Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming. Region IX - Arizona, California, Hawaii, Nevada, American Samoa, Guam. Region X - Alaska, Idaho, Oregon, Washington.

<sup>8</sup> The only exceptions are New Jersey and Minnesota. See Tables I and II.

<sup>9</sup> Alaska, Colorado, Idaho, Kansas, Michigan, Nevada, Ohio, South Carolina and Texas specify who has the burden, but Alaska and Idaho do not specify the standard of proof for rebuttal.

<sup>10</sup> Virginia, South Carolina, Kentucky, Michigan, Ohio, Texas, Kansas, Colorado, Nevada, Alaska and Idaho specify the elements.

<sup>11</sup> The exceptions are Kentucky, South Dakota, and Utah for administrative penalties. Every state provides immunity from civil penalties except Mississippi, which does not provide complete immunity for any category of penalties, only penalty reduction. Rhode Island will not refer the regulated entity to an appropriate prosecuting authority for civil penalties if the entity is

criminal acts.<sup>12</sup> Only Wyoming provides immunity from injunctive relief, subject to certain exceptions.<sup>13</sup> In various combinations, states provide immunity from violations of administrative orders and consent decrees, civil judicial orders and consent decrees, permit provisions, and certain environmental laws and regulations. Every state requires that remedial actions be taken before immunity applies, but only some states require proof that any corrective action was actually taken or require the regulated entity to undertake steps to prevent recurrence of the violation for which immunity is sought.<sup>14</sup>

The section entitled “Exceptions to Immunity” summarizes the provisions in each states’ laws that preclude the granting of immunity. For example, only four of the 20 states withhold immunity if the disclosed violation results in an economic benefit to the violator,<sup>15</sup> while six states could presumably provide some immunity even if the violations are required to be reported.<sup>16</sup> A major category of immunity exceptions concerns the previous occurrence of civil, administrative or criminal environmental violations, with the states’ laws differing on how a previous environmental violation affects a request for immunity for a current violation.

Immunity can be withheld based on scienter, the seriousness of the violation, and the potential for harm. For example, most of the laws presumably provide immunity for a civil violation either negligently or recklessly committed, but withhold immunity if the violations are

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in compliance with the terms of a required consent order.

<sup>12</sup> New Hampshire, Rhode Island, Michigan, Kansas, Colorado, South Dakota, Nevada and Idaho provide some immunity for criminal acts. Rhode Island will not refer the regulated entity to an appropriate prosecuting authority for civil penalties if the entity is in compliance with the terms of a required consent order. Nevada provides for mitigation of criminal penalties only, not immunity.

<sup>13</sup> See Table III.

<sup>14</sup> Only Rhode Island, New Hampshire, New Jersey, South Carolina, Minnesota and Montana require proof of corrective action, while Rhode Island, New Hampshire, Kentucky, Minnesota, Montana, Utah, Nevada and Alaska require steps to prevent recurrence of the violation.

<sup>15</sup> Mississippi, Utah, Montana and Alaska. In Nevada, the presumption of immunity is rebutted to the extent a significant economic benefit occurred as a result of the violation.

<sup>16</sup> New Jersey, Michigan, Minnesota, Texas, Kansas and Nevada.

intentionally or knowingly committed.<sup>17</sup> More controversial though are state provisions granting immunity where the disclosed violation is criminal and recklessly or intentionally committed.<sup>18</sup> Some states provide immunity if the disclosed violation is serious or caused imminent or substantial endangerment.<sup>19</sup> Immunity can also be withheld if there is a pattern of environmental violations.<sup>20</sup>

Nine states provide for some type of penalty mitigation if immunity does not apply.<sup>21</sup> Lastly, many of the immunity statutes contain sunset provisions.

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<sup>17</sup> New Jersey, Texas, Utah, Wyoming, Montana, Nevada and Alaska do not provide for immunity if the violation was recklessly committed.

<sup>18</sup> Minnesota, Kansas, South Dakota, and Idaho presumably will extend immunity for criminally reckless violations, while Idaho will presumably extend it even for intentionally committed violations.

<sup>19</sup> Virginia, Michigan, Ohio, Colorado, Wyoming, Idaho and Alaska will provide some immunity for serious violations, while Michigan, Ohio, Kansas, Colorado, South Dakota, and Wyoming might provide immunity for imminent and substantial endangerment. In Nevada, the presumption against civil or administrative liability is rebutted to the extent it is established that the violation is serious or presents an imminent or substantial danger.

<sup>20</sup> In New Hampshire, Rhode Island, New Jersey, Kentucky, Texas, South Dakota, Montana and Alaska immunity does not apply when environmental violations constitute a pattern. Additionally, in Michigan, Colorado, Wyoming, and Idaho, immunity does not apply if there is a pattern of serious environmental violations.

<sup>21</sup> South Carolina, Mississippi, Michigan, Minnesota, Texas, Wyoming, Utah, Nevada and Alaska.